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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re B.D. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

N.M. et al.,

Defendants and Appellants.

B209090

(Los Angeles County
Super. Ct. No. CK58274)

APPEALS from orders of the Superior Court of Los Angeles County,
Marguerite Downing, Judge. Affirmed.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and
Appellant N.M.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and
Appellant L.D.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel, Jacklyn K. Louie, Deputy County Counsel for Plaintiff and Respondent.

L.D. (father) appeals orders of the juvenile court denying his modification petition pursuant to Welfare and Institutions Code section 388¹ and terminating his parental rights pursuant to section 366.26.

N.M. (mother) appeals the denial of father's section 388 petition, in which she joined, and the termination of her parental rights pursuant to section 366.26.

For the reasons discussed below, we perceive no error in the trial court's rulings. The orders are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. Earlier proceedings.

B.D., born May 2000, and A.D., born March 2002, came to the attention of the Department in March 2005, when it received a referral that B.D. was a victim of physical and emotional abuse by his parents. B.D. was taken to the hospital due to multiple injuries and A.D., who was also at risk, was transported to a foster home.

The adjudication began on July 26, 2005. The juvenile court sustained the first amended petition, finding the children came within the jurisdiction of the juvenile court under section 300, subdivisions (a) [serious physical harm], (c) [serious emotional damage], (e) [severe physical abuse (child under five)], (i) [cruelty], and (j) [abuse of sibling]. The juvenile court found true the allegations, inter alia, that mother forced B.D. to take cold showers, hit him with a belt, ruler and metal wire, and inflicted numerous injuries, including burn marks, to the child's body; and that father struck B.D. with a belt on various occasions.

On August 22, 2005, the juvenile court declared the minors dependents of the court, removed custody from the parents and ordered the children suitably placed. The court declined to offer reunification services to the parents pursuant to section 361.5. It found the parents were "completely lacking in credibility, and their conduct after the events that led to B.D.'s injuries were manipulative and dishonest" and that "acts by

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise specified.

both parents amounted to systematic torture.” The court set a section 366.26 hearing for December 19, 2005.

On November 2, 2005, mother filed a section 388 petition seeking reunification services. On November 4, 2005, The petition was denied.

On November 9, 2005, the parents reportedly were arrested.

At the section 366.26 hearing on December 19, 2005, the court found the minors were not adoptable and no one had come forward to request legal guardianship. The juvenile court set the permanent plan as a planned permanent living arrangement with a goal toward adoption.

On March 6, 2006, father pled nolo contendere to a violation of Penal Code section 273a. He was placed on five years formal probation, a condition of which was that he could not associate with B.D. and A.D. and could not have contact with children under 10 years old without supervision. A restraining order prohibits father from having contact with B.D. until March 6, 2011.

As for mother, she was convicted and served 12 months in prison for violation of Penal Code section 273a. She was released from prison on November 8, 2006 and placed on formal probation for three years. The conditions of probation preclude her from associating with children below age 10 without supervision.

On December 11, 2006, the Department reported the children were in the adoptive home of the maternal aunt, with whom they had been placed on November 15, 2006.

On December 20, 2006, mother filed another section 388 petition, requesting reunification services and visitation, which petition was denied. On January 5, 2007, the parents filed a section 388 petition, seeking return of the children to the parental home. Said petition likewise was denied.

At the section 366.26 hearing on April 20, 2007, the juvenile court ordered monitored visitation for the parents in a therapeutic setting, “to be in consideration of minors desires and emotional well being.”

On May 9, 2007, mother filed another section 388 petition, which was denied based on no change of circumstances and no showing that it was in the best interest of the

minors. Father filed his own section 388 petition on June 19, 2007, which likewise was denied.

2. The pertinent section 388 petition.

On November 9, 2007, father filed yet another section 388 petition, asking that the section 366.26 hearing be taken off calendar to allow the parents and minors to “re-establish their relationship,” and for the court to receive a progress report on the monitored visits from Dr. Selgura, who had monitored six 1-hour visits between the parents and A.D. Father’s section 388 petition was set for a hearing and was denied after argument on January 15, 2008.

On January 25, 2008, the parents filed a joint motion for reconsideration of the January 15, 2008 order denying the section 388 petition.

On April 9, 2008, the juvenile court granted reconsideration and set the matter for both a section 388 hearing and a contested section 366.26 hearing.

On May 27, 2008, the court denied said section 388 petition, ruling the best interests of the children would not be promoted by the proposed change of order. It stated: “The court finds that the Department made more than a substantial effort to comply with the court order. And the report indicates . . . 14 phone calls attempting to find a therapeutic situation where the visits could take place. [¶] Part of the absence was caused by the parents’ incarceration. Parts of it were caused by a period of time when the parents weren’t visiting. The court feels that there really isn’t a change of circumstance. [¶] And clearly, the second prong of the test, the best interest of the children would not be served by providing additional family reunification services. [¶] As to [B.D.], there is a restraining order until 2011. And these boys have been out of their parents’ home for three years. And at this point, we need to continue to set these children on a road of permanency. So the 388 is denied.”

3. Termination of parental rights.

The section 366.26 hearing proceeded on June 25, 2008. After receiving evidence and closing argument, the juvenile court found by clear and convincing evidence that both children are adoptable.

With respect to B.D., the court found terminating parental rights would not be detrimental, in that “he’s been out of the home for two years. There is a restraining order that he cannot see his parents until 2011. He hasn’t seen them in all this time.”

As for A.D., “although the parents have continued to visit with [A.D.], it is still once a week for an hour in a monitored setting. And the court is certain that . . . [A.D.] enjoys visiting, but . . . the court does not believe that there is a parent bond that would cause the court to invoke the exception.

“And so in this case, the court finds that it would be detrimental to return these two boys to their parents; therefore, the parental rights of [mother] and [father] . . . are hereby terminated.”

Both mother and father have appealed, specifying the May 27, 2008 order denying the section 388 petition and the June 25, 2008 order terminating parental rights.

CONTENTIONS

Father contends the juvenile court erred in denying his section 388 petition wherein he established sufficient changed circumstances to warrant granting reunification services and further established that the proposed change would promote the children’s best interests. Father also adopts and joins in the brief filed by mother.

Mother contends: the juvenile court abused its discretion when it failed to allow testimony from the social worker regarding the commencement of the parents’ visitation with A.D.; the juvenile court denied mother due process when it failed to allow testimony from the social worker regarding the commencement of her visitation with A.D.; and the Department’s failure to implement court-ordered monitored visitation disabled mother from establishing the section 366.26, subdivision (c)(1)(B)(i) exception to termination of parental rights. Mother also joins in and adopts father’s arguments.

DISCUSSION

1. No abuse of discretion in denial of section 388 petition.

a. General principles.

“ ‘A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or

changed circumstances exist and (2) the proposed change would promote the best interests of the child.’ ” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205.)

We review the juvenile court’s decision on a petition under section 388 for an abuse of discretion. The appellate court will not disturb the trial court’s decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. (*In re Mary G., supra*, 151 Cal.App.4th at p. 205.)

b. *No abuse of discretion in denial of section 388 petition; the proposed change would not serve the minors’ best interest.*

As indicated, on November 9, 2007, father filed a section 388 petition, asking that the section 366.26 hearing be taken off calendar to allow the parents and minors to “re-establish their relationship,” and for the court to receive a progress report on the monitored visits from Dr. Selgura, who had monitored six 1-hour visits between the parents and A.D.

Father, joined by mother, contends the juvenile court abused its discretion in denying the petition because he established a significant change of circumstances and that reunification was in the minors’ best interest. The parents assert they established that circumstances had drastically changed since the time the children were removed and reunification services bypassed. “By the time of the hearing, they were in complete compliance with the criminal court orders, were stable, conscientious parents, and had also maintained all contact with [A.D.] that they were allowed.” The parents argue that “allowing these children an opportunity to be reunited with Father and Mother was in their best interest.”

Even assuming the parents had somewhat ameliorated the circumstances which led to the minors’ removal, that does not end the inquiry. The parents had the additional burden to establish that the proposed modification was in the minors’ best interest. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

In approaching this issue, we are mindful there continues to be a restraining order prohibiting father from contact with B.D. until 2011, and orders barring the parents from unsupervised contact with any child below the age of 10. At present, A.D. and B.D. are ages six and eight, respectively. Under the conditions of the parents' probation, family reunification would have been impossible.

Further, by the time the juvenile court denied the section 388 petition, on May 27, 2008, the children had been out of the parental home for three years. The evidence showed the children were happy and bonded to the maternal aunt and uncle, their prospective adoptive parents.

For all these reasons, we perceive no abuse of discretion in the trial court's determination that the modification sought by the parents would not be in the children's best interest.

2. No merit to claim of evidentiary error at section 366.26 hearing.

Mother contends the juvenile court abused its discretion, and denied her right to due process, when it failed to allow testimony from the social worker regarding the commencement of the parents' visitation with A.D.

a. The evidentiary ruling in issue.

At the contested section 366.26 hearing, mother's attorney posed the following question to the social worker: "Can you tell me in your opinion why it took six months before the visits were started?"²

The minors' counsel then objected "to the relevance of this entire line of questioning. Visitation and the occurrence of that was handled at the 388, and I don't think at this point, the focus should be on the permanence of the child and any exception that applies. Visitation was already discussed in previous 388's filed by various counsels."

In opposition, mother's counsel asserted: "[A] parent's burden at a .26 hearing is to show that the bond between the parents is so strong that adoption would be

² The visits were ordered in April 2007 and started October 5, 2007.

detrimental. And in order to do that, the parents must show that they have visited consistently to prove that that bond exists. [¶] However, under *Brandon C.*,^[3] we know that this must be viewed in the context of what visitation has been allowed and permitted to the parents. And in this case, I’m attempting to see what efforts have been made to get those visits started.”

The juvenile court then sustained the objection.

b. *No merit to claim of prejudicial evidentiary error.*

By way of background, a minute order dated April 27, 2007 granted the parents monitored visitation in a therapeutic setting. The May 27, 2008 interim review report set forth in detail the Department’s efforts to facilitate visitation. On May 27, 2008, at the time the juvenile court denied the section 388 motion, the court specifically found “*the Department made more than a substantial effort to comply with the court order. And the report indicates . . . 14 phone calls attempting to find a therapeutic situation where the visits could take place.*” (Italics added.)

Thus, one month before the June 25, 2008 section 366.26 hearing, the juvenile court already had made a finding that the Department made “more than a substantial effort” to comply with the court order for monitored visitation in a therapeutic setting.

Further, mother’s brief fails to acknowledge earlier testimony at the June 25, 2008 hearing, in which the social worker testified regarding her attempts to find a monitor and telephone calls she made to different agencies to get the visits started. The social worker further testified, “[a]nd I consulted with my supervisor at the time and with a therapist at the time for referrals to monitor agencies. I also followed up on mother’s request for a specific monitor.”

Therefore, irrespective of the sustaining of an objection to “why it took six months before the visits were started?,” there was no exclusion of relevant evidence regarding visitation. The record reflects the juvenile court was well aware of the reasons for the months-long delay in commencing visitation.

³ *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537-1538.

3. *No merit to contention that Department's failure to implement court-ordered visitation precluded the parents from establishing section 366.26, subdivision (c)(1)(B)(i) exception to termination of parental rights.*

Section 366.26 provides in relevant part: “(c)(1) If the court determines, . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . *Under these circumstances, the court shall terminate parental rights unless either of the following applies:* [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) *The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.*” (Italics added.)

Parents contend the Department's failure to implement court-ordered monitored visitation, as ordered by the court in April 2007, prevented parents from establishing the section 366.26, subdivision (c)(1)(B)(i) exception to termination of parental rights. They argue had the monitored visitation been implemented immediately, parents would have had an additional five months to show the juvenile court that unmonitored visits were appropriate.

The contention lacks merit. As indicated, on May 27, 2008, at the time the juvenile court denied the section 388 petition, the court specifically found “*the Department made more than a substantial effort to comply with the court order. And the report indicates . . . 14 phone calls attempting to find a therapeutic situation where the visits could take place.*” (Italics added.)

Parents do not address the above finding by the juvenile court. In view of said finding, we reject parents' attempt at this juncture to attribute the delay in commencing visitation to the Department.

DISPOSITION

The May 27, 2008 order denying the section 388 petition and the June 25, 2008 order terminating parental rights are affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.